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No. 06-1204

In the Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.,

Petitioners,

v.

MARIANA J. PIMENTEL, THE ESTATE OF ROGER ROXAS, AND GOLDEN BUDHA CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to this Court's Rule 15.8, petitioners submit this brief to address the brief filed by the United States in response to the Court's invitation and the supplemental brief recently filed by respondents.

1. Respondents are incorrect in contending (Resp. Supp. Br. 2-5) that the United States takes issue with the Ninth Circuit's holding on factual grounds. In fact, the United States shows, among other serious legal errors committed below, that the Ninth Circuit's treatment of the Republic's sovereign status under Fed. R. Civ. P. 19 cannot be reconciled with the approach taken either by this Court or by other courts of appeals. See U.S. Br. 9-11. Although respondents complain that the decisions cited by the United States as creating this conflict involved suits involving states, Indian tribes, or the United States itself rather than foreign nations (Resp. Supp. Br. 5), that distinction is wholly immaterial; in this context, principles of sovereign immunity work identically as to each type of sovereign. Certainly, the "alternative method[] of resolving the dispute" invoked by respondents as being available in the decisions cited by the United States that addressed domestic sovereigns (*id.* at 5) – congressional legislation displacing the sovereign's immunity – is no less available when a foreign sovereign is involved.

2. Respondents' improbable assertion that the Republic (see Resp. Supp. Br. 6-9) and the Swiss Federation (see *id.* at 9-10) have joined for the purpose of manipulating the U.S. judicial system and frustrating the district court's decision in this case is entirely without foundation.

First, the Republic has diligently sought recovery of the assets stolen by former President Marcos, including those secreted with Arelma, for more than twenty years. See Pet. 2-4. As the United States notes, the Republic first sought Switzerland's assistance in obtaining the return of assets stolen by Marcos – specifically including the shares of Arelma – in 1986. The Swiss government responded by freezing the as-

sets; the Swiss Federal Supreme Court upheld that determination in 1990. See U.S. Br. 2; Pet. 3. The Swiss Federal Supreme Court authorized transfer of the frozen assets (including the Arelma shares) to be held in escrow by the Philippine National Bank in late 1997 and early 1998, upon a finding that there was no reasonable doubt that Marcos had obtained his Swiss assets illegally. See U.S. Br. 2; Pet. 3. The forfeiture proceeding regarding the Arelma assets currently pending in the Sandiganbayan is a continuation of these long-running efforts to obtain repatriation of Marcos's stolen wealth. Respondents therefore are mistaken in asserting that there is something illegitimate or manipulative about the ongoing Philippine litigation.

Second, respondents also are incorrect in contending that the Republic "participated in the lower court proceedings in this case indirectly through other parties – [the] Philippine National Bank and Arelma – both of which it controlled." Resp. Supp. Br. 6. Respondents also made this assertion below, where it was *rejected* by the Ninth Circuit. As that court held in its initial decision in this case, "[t]he Republic and the PCGG are correct that they assert a claim distinct from those asserted by Arelma and PNB. Without the Republic and the PCGG as parties in this interpleader action, their interests in the subject matter are not protected." Pet. App. 40a.

Third, despite respondents' contrary assertion (see Resp. Supp. Br. 7), there is nothing at all unusual or inappropriate in a sovereign choosing to participate in litigation as a plaintiff while also asserting its immunity in *other* litigation where it is named against its will as a defendant. The very point of sovereign immunity, after all, is to give the sovereign the right to choose when and under what circumstances it will subject itself to the jurisdiction of a court. That the United States is a frequent plaintiff in U.S. courts, for example, hardly renders illegitimate its equally frequent assertion of sovereign immunity in those courts. Here, the Republic sought dismissal of this litigation at the outset; it was of the

view that a dispute between the Republic and its former President, concerning the ownership of assets stolen from the Republic by the former President during his tenure in office – and that also involves claims made by Philippine citizens (not all of whom are members of the Pimentel class) arising out of injuries they suffered in the Philippines at the hands of the former President – should be resolved by a Philippine court. There was nothing manipulative about that election.

Fourth, the decision of the United Nations Human Rights Committee that is invoked by respondents (at Br. 8) is wholly beside the point here. That decision addressed the Philippine Supreme Court's very lengthy delay in resolving an appeal challenging dismissal of a suit brought in a Philippine court to enforce a judgment for human rights claimants entered against the Marcos estate by a U.S. court. The Committee found that the delay violated certain of the Republic's obligations under international law. *Pimentel* v. *The Philippines*, No. 1320/2004 (Mar. 19, 2007), ¶¶ 9.2, 10, 11. Noting that the Philippine Supreme Court had in fact ultimately reversed the dismissal and that the case to enforce the U.S. judgment *is* now proceeding in the Philippine trial court, however, the Committee determined that the claimants were required to exhaust their remedies *in the Philippine courts*. *Id.* ¶ 8.2. In any event, and more fundamentally, the determination that Marcos's victims are entitled to a fair adjudication of their claims against him in the Philippines has nothing at all to do with the question in this case: whether a U.S. court may adjudicate ownership of property claimed by a foreign sovereign.

Respondents make the same sort of fundamental error in contending that the Republic's position in this litigation is somehow inconsistent with its past support for plaintiffs seeking relief *from Marcos and his estate* in U.S. courts. See Resp. Supp. Br. 9. The Republic did not, and does not, oppose the efforts of Marcos's victims and creditors to recover from his estate. But the question in this litigation is not

whether U.S. courts may adjudicate human rights claims against Marcos: *it is whether the Arelma assets belong to the Republic and never were a part of the Marcos estate at all.* That question currently is being litigated between the Republic and the estate before the Sandiganbayan.

Fifth, it should be manifest that Switzerland's diplomatic note relating to this litigation is neither "manipulative" nor "contrary to the decisions of its own Supreme Court." Resp. Supp. Br. 9, 10. In fact, the Swiss Federal Supreme Court rejected an attempt by these respondents to attach assets held by Marcos in Switzerland, noting that such efforts would "prevent mutual assistance measures of Switzerland" to repatriate stolen assets to the Phlippines *Fed. Office for Police Affairs* v. *Fondation Maler, Arelma, Inc., et al.*, No. B 65471/29 (Swiss Fed. Sup. Ct. Dec. 19, 1997), at 33. Although the court expressed sympathy for human rights plaintiffs, it explained that "the victims of the Marcos regime as a matter of principle are obliged to either participate in the probate proceedings [in the Philippines] if they want to assert Ferdinand Marcos' personal responsibility for human rights violations committed during his tenure, or they have to claim damages from the Philippine government for the wrongs committed by its organs." *Id.* at 28.

Having been unsuccessful in Switzerland, respondents are now trying an identical tactic in the United States. That is why Switzerland, in urging the United States to seek reversal of the Ninth Circuit's decision here, noted that (1) the Swiss Federal Supreme Court decisions in 1997 and 1998 "affirmed that, under international law, the Philippines should have the opportunity to determine the appropriate manner in which the Marcos funds should be used for compensating victims of human rights violations of the Marcos regime"; (2) the decision below runs "counter to the current trends in multilateral cooperation" in repatriating stolen assets to the country of origin; (3) that decision improperly "seem[s] to negate the Philippines' sovereign interests"; and

(4) the Ninth Circuit's decision also "could make future governmental cooperation in such matters more complicated." Pet. Reply Br. App. 1a-2a.

3. Finally, and most significantly, respondents' criticism of the Philippine and Swiss governments should not obscure the great legal and practical significance of the issues presented in the petition. Echoing concerns raised by the governments of the Philippines and Switzerland, the United States has informed the Court that the Ninth Circuit's decision "raises significant concerns with respect to the Nation's foreign relations. It prejudices ongoing litigation in the Philippines regarding a matter of great public concern to that country, conflicts with an understanding between the Philippines and Switzerland regarding adjudication of the Marcos assets, and threatens to undermine the ability of the United States to enforce its forfeiture judgments abroad as well as to assert sovereign immunity in foreign courts in similar circumstances." U.S. Br. 7. The holding below therefore threatens both "to undermine significant interests of the United States" and to "undermine multilateral anti-corruption cooperation." *Id.* at 18, 19. These considerations, which are not addressed at all by respondents, make review imperative.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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